16 October 1951

OGC HAS REVIEWED.

MEMORANDUM FOR THE RECORD

SUBJECT: Legality of Contracting with Government Employees for Procurement Purposes.

1. Title 18 U.S.C. 434 provides:

> "Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity shall be fined not more than $2,000 or imprisoned not more than two years, or both."

This section is based on a statute of 1907 under which most of the decisions have been made. The 1907 statute was revised in 1948 to "... further what appeared unquestionable to be the intent of Congress, namely, to cover all persons acting for the United States Government in any official function."

2. No appellate decision, which could be related to the facts of the Beechcraft situation has been made on this statute. However, this and a related statute, 18 U.S.C. 216, which provides criminal penalties for Government employees who obtain any material benefits through Government procurement, are referred to in Muschany v. United States, 65 S. Ct. 442 (1945). This case dealt with the legality of "commission contracts" but some of the terminology indicates the Court's sentiments beyond those immediate facts. The quotations set forth below intimate that the court strictly construes these statutes.

> (a) "No other case has come to our attention which has declared that a commission or purchase contract is invalid on the ground of public policy. Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.
>
> (b) "As the term 'public policy' is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy.
>
> (c) "It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated. ... Only dominant public policy would justify such action. In

the absence of a plain indication of that policy through long Governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, this court should not assume to declare contracts of the War Department contrary to public policy. The courts must be content to await legislative action."

3. The Attorney General, in an opinion on a still older but similar statute, held:

> "There is in the statutes no general provision whereby officers of the executive branch of the Government are forbidden to contract directly with the Government as principals, in matters separate from their offices and in no way connected with the performance of their official duties, nor are those officers forbidden to be connected with such contracts after they are procured, by acquiring an interest therein." 14 Op. Atty. Gen. 483 (1874).

The underlinings are mine and bear notice in the fact situation at hand.

A later opinion by the Attorney General considers, in light of certain analogous statutes, the legality of a Postmaster bidding for printing work of the Postal Department:

> "It seems obvious that the provisions of the statutes referred to above, including Section 226, were aimed, to speak generally, at the evil arising from the use, by a public officer or employee, of his official position to procure contracts, favors or benefits from the Government of which he is a member. Those statutes all seem to have in view an act by the employee, which shall enter into the procuring of some favor from the Government and be influential to that end. Of course, the act of the public official need not be the entire moving cause of the awarding of a contract with the Government, or the procurement of a favor or benefit therefrom, but it must be influential to that end and concerned therewith." 29 Op. Atty. Gen. 199

4. The Comptroller General has consistently been more stringent in dealing with these contracts and his refusal to authorize funds has undoubtedly been paramount in formulating a general policy against entering into such situations on the basis of moral, rather than legal limitations. A few fact situations and holdings will illustrate:

(a) 4 Comp. Gen. 116.

Employees of the Labor Department rented their personal automobiles to the Department. The vehicles in turn were used by any official or employee of the division on official business. The rental rate was said to be much cheaper than if the vehicles had been rented from outside parties.

Held: The practice was apparently established in good faith and the Comptroller General will authorize the payment for past vouchers. However, further authorization is denied because "... it has been repeatedly held that contracting with employees of the Government though not expressly prohibited by statute is authorized only in exceptional cases, such practice being contrary to public policy, provocative of trouble, and having a tendency toward favoritism. The practice is especially objectionable when the contracting is between the employee and the particular service in which he is employed, as in the instant cases."

(b) 5 Comp. Gen. 94.

The only doctor at Kodiak, Alaska, was appointed public health officer. Bids for a hospital at the station were let. The only hospital within 325 miles was owned by same doctor appointed as public health officer. This doctor bid to provide the service.

Held: While not necessarily unlawful, if not in contravention of specific statutory prohibitions, contracts between the Government and its employees present an undesirable situation, suggesting favoritism, and are not to be entered into except for the most convincing reasons, such as the non-availability of other sources for the services to be rendered and even the non-availability of other sources may not always justify such contracts. Especially is the practice objectionable when the contracting is between an employee and the particular service in which he is employed, as in the instant case.

(c) 13 Comp. Gen. 281.

A Federal employee, as a governmental contracting officer rented office typewriters from himself -- at a price equal to lowest competitive bid.

Held: Contracts between the United States and an employee to furnish a service the extent of, and the necessity for which rests upon the determination of the contracting employee, are open to criticism irrespective of the bona fides with which the employee's determination may be exercised, and cannot be sanctioned.

(d) 14 Comp. Gen. 403.

A supervisor of field work bid for the delivery of a tractor to be used on the homestead projects.

Held: Aside (underlining mine) from the terms of the acts of March 4, 1909, and August 10, 1917, it has been repeatedly held that the United States should not, where the needs of the Government reasonably can be otherwise supplied, contract with its officers or employees for the reason that such contracts are against public policy and would afford grounds for complaint as to alleged favoritism, fraud, etc., in the conduct of public business. Accordingly, you are advised that no bids should be considered or contracts entered into with any employee of the Government ... of the United States -- whether such employees be temporary or permanent -- for the delivery of supplies and materials.

(e) Similar language is repeated in 17 Comp. Gen. 123 where a government employee "procured from his company the supplies paid for on the involved vouchers, after informal bids had been received, on purchase orders evidencing the informal agreement signed by himself as purchasing agent for the Civil Works Administration.

(f) Exceptions to the rule of the Comptroller General can be found but the situations are very circumscribed and the general rule against such practices is stressed.

(1) 21 Comp. Gen. 705.

The Comptroller General permitted employees of the Puerto Rico Reconstruction Administration to participate in a lottery with other qualified applicants to obtain leases on low-cost housing projects constructed by the Administration. The Comptroller General laid stress on the fact that those employees participating in the lottery would not act on the applications in behalf of the United States.

(2) 25 Comp. Gen. 690.

The Interior Department sought to obtain through competitive bids, a pilot and his airplane for seasonal forest fire patrol. If the joint service was obtained under the plan proposed, it would result in having an employee of the Government also acting as a contractor furnishing equipment to be used by him in connection with his employment.

The Comptroller General authorized this arrangement but these points stand out:

(a) The contract for such joint services was let by competitive bids, thus "... it was not open to criticism for possible favoritism and preferential treatment..."

(b) Considerable economic advantage could be achieved through the joint service.

(c) The pilot was in no way acting as an agent for the Government in its acceptance of the bid.

(d) The Comptroller General cited a statute relating to the Department of Agriculture permitting the renting of equipment from employees of the Department provided the property rented would be used by others than the rentor. This was seen as indicating (though the statute was not applicable in the instant case) "a policy of Congress to prohibit the hiring or renting of equipment from employees for use by the employees from whom hired or rented."

(3) 27 Comp. Gen. 735.

In this case a Bureau of Standards employee submitted the only bid to supply the Bureau with an electron microscope. The same employee was to use this instrument in his work. The Comptroller General approved the purchase, recognizing it to be an exceptional case since this microscope was the only one of its kind in existence. Certainly the departure in this case did not open much of a hole in the line of the general rule.

(g) In summary, it appears that though little may be found in court decisions which would prohibit transactions of this nature, the Comptroller Generall has established general Governmental practice and concepts of morality which frown upon:

(1) Transactions where the Government employee buys from himself as an agent for the Government.

(2) Transactions where the employee is selling to the Agency in which he is employed.

(3) Transactions where the employee selling to the Government is not doing so by participating in open competitive bidding.

(4) Transactions where the employee selling will be using the article sold in his duties.

(h) The general rule admits these exceptions:

(1) Where the situations enumerated above are non-existent; or,

(2) Where the article desired cannot be purchased elsewhere.

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